TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 146.

THE THIRD NATIONAL BANK OF BUFFALO, N. Y., PLAINTIFF IN ERROR,

vs.

THE BUFFALO GERMAN INSURANCE COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

FILED OCTOBER 21, 1902.

(18,706.)

a STATE OF NEW YORK:

Court of Appeals, Clerk's Office.

To the judges of the Supreme Court of the United States:

The judges of the court of appeals of the State of New York, in compliance with the writ of error issued herein, do hereby make return thereto in the case of The Buffalo German Insurance Co., respondent, *vs.* The Third National Bank of Buffalo, appellant.

Seal Court of Appeals, State of New York.

In witness whereof I have hereunto set my hand and affixed the official seal of the court at the city of Albany, this twenty-ninth day of September, A. D., one thousand nine hundred and two.

W. H. SHANKLAND, *Clerk.*

b Court of Appeals, State of New York.

THE BUFFALO GERMAN INSURANCE COMPANY
against
THE THIRD NATIONAL BANK OF BUFFALO.

Appeal Book.

Hickman & Palmer, attorneys for respondent, 3 German Ins. Co.'s bldg., Buffalo, N. Y.

Lewis & Lewis, attorneys for appellant, 23–25 Erie Co. Sav. Bank building, Buffalo, N. Y.

c *Statement Required by Rule* 41.

This claim was commenced by the service of the summons and complaint on October 17th, 1896. The answer of the defendant was served November 11, 1896, and its amended answer December, 18, 1896. The names of the original parties in full were The Buffalo German Insurance Company against The Third National Bank of Buffalo. This action was tried before Hon. Truman C. White, justice, at equity term, January 22, 1897, and was decided in favor of the defendant; an opinion was written by the justice. The case was thereafter argued on an appeal to the appellate division, fourth department, which affirmed the judgment of the court below. An opinion was written by Mr. Justice Adams and is reported in 29 Appellate Division, at page 137. The case was thereafter argued on appeal to the court of appeals and the judgment reversed, and the case sent back for a new trial. An opinion was written therein by Justice Gray and is reported in 162 N. Y. at page 168. The case was again tried before Justice Lambert, at equity term, on the 25th day of April, 1900, and judgment awarded to the plaintiff. There was no opinion written by Justice Lambert. The case was there-

after argued on an appeal to the appellate division, fourth department, which affirmed the judgment of the court below. There has been no change in parties.

STATE OF NEW YORK, }
County of Erie, City of Buffalo, } ss.:

Loran L. Lewis, Jr., being duly sworn, says: That he is one of the attorneys for the defendant herein; that no opinion was given by the trial court at the last trial herein to deponent's knowledge and belief. That no opinion was given herein by the appellate division upon the last argument of the appeal to deponent's knowledge or belief.

LORAN L. LEWIS, JR.

Sworn to before me November 30, 1901.

JOHN J. PRICE,
Com. of Deeds, Buffalo, N. Y.

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Supreme Court, County of Erie.

THE BUFFALO GERMAN INSURANCE COMPANY }
against
THIRD NATIONAL BANK OF BUFFALO. }

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the county of Erie.

Dated this 16th day of October, 1896.

HICKMAN & PALMER,
Plaintiff's Attorneys.

Office and post-office address, 3 German Ins. Co.'s bldg., Buffalo, N. Y.

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Supreme Court, Erie County.

THE BUFFALO GERMAN INSURANCE COMPANY }
against
THIRD NATIONAL BANK OF BUFFALO. }

The plaintiff above named, by Hickman & Palmer, its attorneys, complains of the defendant above named, and for its cause of action alleges:

That at all the times hereinafter mentioned, the plaintiff was, and now is, a domestic corporation, created, existing and doing business under and by virtue of the laws of the State of New York, and at

all said times the defendant was, and now is, a corporation known as a national banking association, created, organized and existing under the provisions of the act of Congress of the United States of America, relating to national banks.

That on the 3d day of December, 1890, one Emanuel Levi was the owner of one hundred shares of the capital stock of The Third National Bank of Buffalo, the defendant above named, of the par value of one hundred dollars each, evidenced by the certificate of stock issued by said association to him for that amount, and numbered B 60; that on the same date, said Emanuel Levi was also the owner of one hundred shares of the capital stock of said Third National Bank of Buffalo, the defendant above named, of the par value of one hundred dollars each, evidenced by the certificate of stock issued by said association to him, for that amount, and numbered B 61; that on the same date said Emanuel Levi was also the owner of fifty shares of the capital stock of said Third National Bank of Buffalo, the defendant above named, of the par value of one hundred dollars each, evidenced by the certificate of stock issued by said association to him for that amount, and numbered B 62; that on the same date, said Emanuel Levi was also the owner of one hundred shares of the capital stock of said Third National Bank of Buffalo, the defendant above named, of the par value of one hundred dollars each, evidenced by the certificate of stock issued by said association to him for that amount, and numbered B 58; that on the same date, said Emanuel Levi was also the owner of one hundred shares of the capital stock of said Third National Bank of Buffalo, the defendant above named, of the par value of one hundred dollars each, evidenced by the certificate of stock issued by said association to him for that amount, and numbered B 59; that all of said stock and each and every of said certificates on said date, stood in the name of said Emanuel Levi on the books of the defendant.

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That on the 3rd day of December, 1890, Emanuel Levi made his certain promissory note in writing, bearing date on that day, wherein and whereby he promised to pay to the order of the plaintiff on demand, twenty-five thousand dollars at its office in Buffalo, with interest at six per cent. per annum, and delivered the same to the plaintiff, for value.

That on the 13th day of August, 1891, said Emanuel Levi made his certain promissory note in writing, bearing date on that day, wherein and whereby he promised to pay to the order of the plaintiff on demand, twenty thousand dollars, at its office in Buffalo, with interest at six per cent. per annum, and delivered the same to the plaintiff for value.

4

That on the 25th day of May, 1892, Emanuel Levi made his certain promissory note in writing, bearing date on that day, wherein and whereby he promised to pay to the order of the plaintiff on demand, ten thousand dollars, at its office in Buffalo, with interest at six per cent. per annum, and delivered the same to the plaintiff for value.

That as collateral security for the payment of said first mentioned note, he pledged and delivered to the plaintiff certificate B 60 for one hundred shares of the capital stock of the defendant, of the par value of one hundred dollars each; certificate B 61 for one hundred shares of the capital stock of the defendant, of the par value of one hundred dollars each, and certificate B 62 for fifty shares of the capital stock of the defendant of the par value of one hundred dollars each, and thereby empowered and authorized said insurance company, in case of default in the payment of the said note at its maturity to sell the said stock at public or private sale, as it might deem best.

That as collateral security for the payment of the said second above mentioned note, he pledged and delivered to the plaintiff, certificate B 58 for one hundred shares of the capital stock of the defendant, of the par value of one hundred dollars each, and certificate B 59 for one hundred shares of the capital stock of the defendant
5 of the par value of one hundred dollars each, and thereby empowered and authorized said plaintiff, in case of default in the payment of said note at its maturity, to sell the said stock at public or private sale, as it might deem best.

That as collateral security for the payment of the third above mentioned note, said Emanuel Levi pledged and delivered to said plaintiff, certificate B 58 for one hundred shares of the capital stock of the defendant, of the par value of one hundred dollars each; certificate B 59 for one hundred shares of the capital stock of the defendant, of the par value of one hundred dollars each; certificate B 60 for one hundred shares of the capital stock of the defendant, of the par value of one hundred dollars each; certificate B 61 for one hundred shares of the capital stock of the defendant, of the par value of one hundred dollars each, and certificate B 62 for fifty shares of the capital stock of the defendant, of the par value of one hundred dollars each, and thereby empowered and authorized said plaintiff, in case of default in the payment of the said note at its maturity, to sell the said stock at public or private sale, as it might deem best.

That heretofore, and before the 22nd day of June, 1896, each of said notes by their terms became due and payable, and payment thereof was demanded and refused, and by virtue of the power of sale contained in the certificates pledging said stock as collateral to the plaintiff as aforesaid, the plaintiff gave notice on the 22d day of June, 1896, that under and by virtue of said pledge of stock, default
6 having been made in the payment of said notes, it would sell the said certificates of stock, and each thereof at public auction, in the city of Buffalo, on the 30th day of June, 1896, at ten o'clock in the forenoon.

That pursuant to such notice at the time last mentioned, and at the place mentioned in said notice, the said certificates of stock, and each thereof, were duly offered for sale at public auction, to the highest bidder, and the said certificates were at said sale duly sold to the plaintiff, its bid therefor being the highest sum bidden on

said sale, and the plaintiff thereupon became, and was, and now is the owner of said certificates of stock.

That thereafter, and on or about the 1st day of July, 1896, the plaintiff presented the said certificates of stock, and each thereof, to the president and cashier of said defendant bank, at the office of said defendant, during banking hours, and demanded that the said certificates of stock, and each thereof, should be transferred on the books of said association to the plaintiff; that the said cashier and president of said bank both declined and refused to transfer the said certificates of stock, or either or any of them to the plaintiff as requested.

And this plaintiff further alleges upon information and belief, that since it purchased said stock, and after the demand upon defendant, that it should transfer the same to this plaintiff, the defendant has declared a dividend on the said stock, amounting to the sum of thirteen hundred and fifty dollars, but has refused to deliver said dividend to this plaintiff.

Wherefore, the plaintiff demands judgment herein, directing
7 the defendant to transfer the said certificates of stock, and each and every of them, upon the books of said defendant, to this plaintiff, and for judgment against the defendant for the dividends so declared which it has neglected and refused to pay to the plaintiff as requested, and for such other and further relief in the premises as to the court may seem proper, besides the costs of this action.

HICKMAN & PALMER,
Attorneys for Plaintiff, 3 *German Ins. Co.'s Bldg., Buffalo, N. Y.*

STATE OF NEW YORK, }
County of Erie, } ss:

Oliver J. Eggert being duly sworn deposes and says that he is an officer, viz: secretary of the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

OLIVER J. EGGERT.

Subscribed and sworn to before me this 16th day of October, 1896.

EDWARD D. STREBEL,
Notary Public, Erie Co., N. Y.

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Supreme Court, Erie County.

THE BUFFALO GERMAN INSURANCE COMPANY
against
THE THIRD NATIONAL BANK OF BUFFALO.

The defendant herein, by Lewis & Lewis, its attorneys, answering the plaintiff's complaint,

Upon information and belief, denies that on the 3rd day of December, 1890, one Emanuel Levi, was the owner of one hundred shares of the capital stock of the Third National Bank of Buffalo, evidenced by the certificate of stock issued by said association to him for that amount and numbered B, 60.

And on information and belief, denies that on the same date said Emanuel Levi was also the owner of one hundred shares of the capital stock of the said Third National Bank of Buffalo, evidenced by the certificate of stock issued by said association for that amount, and numbered B 61.

And upon information and belief, denies that on the same date, said Emanuel Levi was also the owner of fifty shares of the capital stock of said Third National Bank of Buffalo, evidenced by the certificate of stock issued by said association to him for that amount, and numbered B, 63.

And upon information and belief, denies that on the same date said Emanuel Levi was also the owner of one hundred shares of the capital stock of said Third National Bank of Buffalo, evidenced
9 by the certificate of stock issued by said association to him for that amount, and numbered B, 58.

And upon information and belief, denies that on the same date, said Emanuel Levi was also the owner of one hundred shares of the capital stock of said Third National Bank of Buffalo, evidenced by the certificate of stock issued by said association to him for that amount, and numbered B, 59.

And the defendant herein alleges that it has no knowledge or information sufficient to form a belief as to whether or not on the 3rd day of December, 1890, Emanuel Levi made his certain promissory note in writing, dated on that day, wherein or whereby he promised to pay to the order of plaintiff on demand, $25,000 at its office in Buffalo, with interest at 6 % per annum, or delivered the same to plaintiff for value, and therefore denies the same.

And this defendant alleges that it has no knowledge or information sufficient to form a belief as to whether or not on the 13th day of August, 1891, said Emanuel Levi made his certain promissory note in writing, bearing date on that day, wherein or whereby he promised to pay to the order of the plaintiff on demand, $20,000 at its office in Buffalo, with interest at 6 % per annum, or delivered the same to plaintiff for value, and therefore denies the same.

And this defendant further alleges that it has no knowledge or information sufficient to form a belief as to whether or not on the

25th day of May, 1892, Emanuel Levi made his certain
10 promissory note in writing, bearing date on that day, wherein or whereby he promised to pay to the order of the plaintiff on demand $10,000 at its office in Buffalo, with interest at 6 % per annum, or delivered the same to the plaintiff for value, and therefore denies the same.

And this defendant further alleges that it has no knowledge or information sufficient to form a belief as to whether or not, as collateral security for the payment of said first mentioned note the said Emanuel Levi pledged or delivered to the plaintiff certificate B 60, for one hundred shares of the capital stock of the defendant, or certificate B 61, for one hundred shares of the capital stock of the defendant, or certificate B 62 for fifty shares of the capital stock of the defendant, or thereby empowered or authorized said insurance company in case of default in the payment of said note at its maturity, to sell the said stock at public or private sale as it might deem best, and therefore denies the same.

And this defendant alleges that it has no knowledge or information sufficient to form a belief as to whether or not as collateral security for the payment of said second above mentioned note, said Levi pledged or delivered to the plaintiff certificate B 58, for one hundred shares of the capital stock of the defendant, or certificate B 59 for one hundred shares of the capital stock of defendant, or thereby empowered or authorized said plaintiff in the case of default in the payment of said note, at its maturity, to sell said
11 stock at public or private sale, as it might deem best, and therefore denies the same.

And this defendant alleges that it has no knowledge or information sufficient to form a belief as to whether for collateral security for the payment of the third above mentioned note, said Emanuel Levi pledged or delivered to said plaintiff, certificate B 58, for one hundred shares of the capital stock of the defendant, or certificate B 59, for one hundred shares of the capital stock of the defendant, or certificate B 60, for one hundred shares of the capital stock of the defendant, or certificate B 61, for one hundred shares of the capital stock of defendant, or certificate B 62, for fifty shares of the capital stock of the defendant, or thereby empowered or authorized said plaintiff, in case of default in the payment of said note at its maturity, to sell the said stock at public or private sale, as it might deem best, and therefore denies the same.

And this defendant alleges that it has no knowledge or information sufficient to form a belief as to whether or not heretofore and before the 22nd day of June, 1896, each of said notes by their terms became due and payable, or payment thereof was demanded and refused, or by virtue of the power of sale contained in the certificates pledging said stock as collateral to the plaintiff, as set out in the said complaint, the plaintiff gave notice on the 22nd day of June, 1896, that under or by virtue of said pledge of stock, default having been made in the payment of said notes, it would sell the said certificates

of stock or each thereof at public auction on the 30th day of
12 June, 1896, at ten o'clock in the forenoon, and therefore denies the same.

And this defendant upon information and belief denies that pursuant to such notice at the time last mentioned, or at the place mentioned in said notice, the said certificates of stock or each thereof were duly offered for sale at public auction to the highest bidder, or that the certificates were at said sale duly sold to the plaintiff, its bid therefor being the highest sum bidden on said sale, or that the plaintiff thereupon became or was, or now is the owner of said certificates of stock.

II.

And for a second separate and further defense to the plaintiff's pretended cause of action herein, and as a counter-claim thereto, the defendant alleges, that at the time that it is claimed that the said Emanuel Levi made his certain promissory note in writing, to-wit the 3rd day of December, 1890, wherein and whereby he promised to pay to the order of the plaintiff herein the sum of $25,000, the said Emanuel Levi was indebted to the Third National Bank of Buffalo in the sum of $28,000, as a collateral and continuing security to which, and for any renewal or renewals or part renewal or part renewals, for future advances made by said bank to said Emanuel Levi, the said bank held all the stock of the said The Third National Bank of Buffalo as collateral security to said indebtedness under a pledge made by the said Emanuel Levi to it, the said bank.
13 And at the time that it is claimed that the said Emanuel Levi made his certain promissory note in writing, to-wit the 13th day of August, 1891, wherein and whereby he promised to pay to the order of the plaintiff herein the sum of $20,000, the said Emanuel Levi was indebted to the Third National Bank of Buffalo in the sum of $32,000; and at the time that it is claimed that the said Emanuel Levi made a certain promissory note in writing to-wit, the 25th day of May, 1892, wherein and whereby he promised to pay to the order of the plaintiff herein the sum of $10,000, the said Emanuel Levi was indebted to the Third National Bank of Buffalo in the sum of $20,000, as a collateral and continuing security, to which, and for any renewal or renewals or part renewal or part renewals, or future advances made by the said bank to the said Emanuel Levi, the said bank held all the stock of the said Third National Bank of Buffalo as collateral security to said indebtedness under a pledge made by the said Emanuel Levi, to it, the said bank.

And this defendant alleges that there is still due to it from the said estate of Emanuel Levi, deceased, as direct renewal of the indebtedness, above set forth, of Emanual Levi to the defendant, the sum of $16,357.99, and interest thereon from the 27th day of August, 1896.

And this defendant further alleges that all of the said stock mentioned in the plaintiff's complaint herein, as being issued to said

Emanuel Levi, bore the following endorsement printed across the face thereof, as follows:

14 "Subject to the lien or liens referred to in section 15 of the by-laws of said bank in the following words: No transfer of the stock of this association shall be made without the consent of the board of directors by any stock holder who shall be liable to the association either as principal debtor, or otherwise, which liability shall be a lien upon the said stock and all profits thereof and dividends."

And this defendant further alleges upon information and belief that the plaintiff herein did have actual knowledge of the facts aforesaid, and knew that the said Emanuel Levi was indebted to the said defendant herein in a large amount, and that it held said stock as collateral security to said indebtedness as above set forth.

And upon information and belief the defendant alleges that it extended the time for the payment of said indebtedness, and furnished other considerations to the said Emanuel Levi, upon the personal security of such stock, in good faith, as a consideration for the pledge of such stock to it by said Levi; that it took such pledge in good faith to secure the payment of a debt previously contracted in good faith; that the plaintiff was informed of such facts, and plaintiff's claim or lien if any is inferior to and subsequent to the claim or lien of this defendant.

III.

And for another, separate and third defence to the plaintiff's pretended cause of action herein, the defendant alleges upon information and belief, that heretofore and before the commencement of this action the said Emanuel Levi departed this life, and left

15 a last will and testament wherein and whereby he nominated Rosa Levi and Louis E. Levi as the executors of his said last will and testament and that thereafter and before the commencement of this action, the said will of said Emanuel Levi was duly offered for probate and probated by the surrogate of the county of Erie, and the said Rosa Levi and Louis E. Levi, prior to the beginning of this action, qualified as such executors and entered upon the duties and are now acting as such executors of the last will and testament of Emanuel Levi, deceased.

And the defendant alleges upon information and belief, that there is a defect in the party defendant herein, inasmuch as the said executors of the estate of Emanuel Levi, are necessary and material parties to this action, and that no proper adjudication can be had hereon unless such executors are made parties defendant hereto.

Wherefore, defendant prays the judgment of this court dismissing plaintiff's complaint herein, and establishing the amount due to this defendant from the estate of the said Emanuel Levi, deceased, and declaring the lien, if any, of the plaintiff herein, as subsequent to the lien of the defendant in and to the stock mentioned in the complaint in this action, and that the plaintiff and all other persons be barred and foreclosed of all right, claim, lien and equity of redemp-

tion in and to said stock, and that the said stock, or so much thereof as may be sufficient to raise the amount due the defendant for principal, interest and costs, may be decreed to be sold according to law, and that out of all the moneys arising from the sale thereof,
16 that the defendant may be paid the amount due by virtue of the said indebtedness of the estate of Emanuel Levi to it, with interest to the time of such payment, and the costs and expenses of this action so far as the amount of such moneys properly applicable thereto will pay the same; and that the said Louis E. Levi and Rosa Levi, as executors of the last will and testament of Emanuel Levi, deceased, may be adjudged to pay any deficiency which may remain after applying all said moneys so applicable thereto, and that the defendant may have such other or further relief, or both, in the premises as to the court may seem proper.

LEWIS & LEWIS,
Defendant's Attorneys, 14 *Court Street, Buffalo, N. Y.*

COUNTY OF ERIE, } ss:
City of Buffalo, }

Charles A. Sweet, being duly sworn, deposes and says: That he is the president of the defendant in the above entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

CHARLES A. SWEET.

Sworn to before me this 14th day of Dec., 1896.

H. LE LANZLIN,
Notary Public in and for Erie County, N. Y.

17 Supreme Court, Erie County.

BUFFALO GERMAN INSURANCE COMPANY } Erie Special Term for
against } the Trial of Issues of
THIRD NATIONAL BANK OF BUFFALO. } Fact.

Hickman & Palmer, for plaintiff.
George L. Lewis and Adelbert Moot, for defendant.

The above entitled action having been brought to trial at a special term of the supreme court for the trial of issues of fact, held at the city of Buffalo, on the 25th day of April, 1900, after hearing the proofs and the allegations — the respective parties, I make the following

Finding of Facts.

I. That the plaintiff is a monied corporation organized under the laws of the State of New York; that the defendant is a national banking corporation organized under the act of Congress authoriz-

ing the formation of national banks passed in 1864 and incorporated thereunder in 1865.

II. That Emanuel Levi was the owner of four hundred and fifty shares of the capital stock of the defendant of the par value of forty-five thousand dollars, evidenced by certain certificates of stock issued to him by the defendant and numbered B 58, B 59, B 60, B 61, and B 62, the first four of said certificates being for one hundred shares each and the fifth certificate being for fifty shares.

18 That said certificates of stock bear date July 2nd, 1888, and are in form as follows:

"Number B–60. Shares 100.

STATE OF NEW YORK,

Third National Bank of Buffalo.

This is to certify that Emanuel Levi is the owner of one hundred shares, of one hundred dollars each, of the capital stock of the Third National Bank of Buffalo, subject to the lien or liens referred to in section fifteen of the by-laws of said bank in the following words:

'No transfer of the stock of this association shall be made without the consent of the board of directors, by any stockholder, who shall be liable to the association either as principal debtor or otherwise, which liability shall be a lien upon the said stock and all profits thereof and dividends.'

And that the said stock is transferable only on the books of the bank by him or his attorney on the surrender and cancellation of this certificate and compliance with said by-laws.

Dated, Buffalo, N. Y., this 2d day of July, 1888.

CHARLES A. SWEET, *President.*

N. ROCHESTER, *Cashier.*"

III. That on December 3, 1890, said Emanuel Levi borrowed of the plaintiff the sum of twenty-five thousand dollars, giving to it therefor his demand note, with interest, and secured the payment

19 thereof by delivering said certificates B 60, B 61 and B 62 and an assignment thereof, together with a receipt for the amount of said loan, and in and by which he also assigned said certificates to the plaintiff as collateral security for the payment of said loan, and in case of default in the payment of said loan and interest authorized the said plaintiff to sell the said stock and certificates at public or private sale on five days' notice by letter mailed to him at his address, and from the proceeds of such sale, after deducting all costs and expenses, to pay the said debt and interest; the balance to be returned to said Levi.

IV. On August 13, 1891, the said Emanuel Levi borrowed from the plaintiff the sum of twenty thousand dollars, giving his demand note, with interest, and secured the payment thereof by delivering said certificates B 58 and B 59 to the plaintiff together with an

assignment and receipt similar in form to those mentioned in the third finding hereof.

V. That on May 25, 1892, the said Emanuel Levi borrowed the sum of ten thousand dollars from the plaintiff, giving his demand note, with interest, and secured the payment thereof by delivering to the plaintiff all of the certificates hereinbefore mentioned together with an assignment and receipt similar in form to those mentioned in the third finding hereof.

VI. That after borrowing said sums from the plaintiff and the giving to it of said assignments, and on June 10, 1893, Emanuel Levi died, and that thereafter and on June 21st, 1893, Rosa
20 Levi and Louis E. Levi were duly appointed as the executors of his estate and qualified as such, and are still acting as such.

VII. That on the 9th day of June, 1896, there was due and unpaid on said loans the sum of fifty-five thousand dollars of principal, three hundred dollars of the interest due on January 1, 1896, and interest from January 1, 1896.

VIII. That on June 9, 1896, the plaintiff caused to be served upon each of the executors of the estate of Emanuel Levi a notice in writing of the default in the payment of said debt and demanding the payment thereof and interest, and requiring the payment of said debt and the redemption of said stock on or before the 16th day of June, 1896, and stating that in the event of failure to comply with such demand that the loan would be collected by the sale of the stock in accordance with the conditions of the loans.

IX. That such debts were not paid nor said stock redeemed as required, and on the twenty-second day of June, 1896, the plaintiff caused a notice to be served upon each of the executors of the estate of said Levi, stating the conditions of said loans and the pledging of said certificates of stock, the default in the payment and redemption thereof, and giving notice that said certificates of stock and each thereof would be sold at public auction at the office of the board of directors, No. 4 German Insurance Company's building, corner Main and Lafayette streets, Buffalo, N. Y., on the 30th day of June, 1896, at ten o'clock in the forenoon; and that
21 on the same day the plaintiff caused a copy of such notice to be posted at each of the following public places in the city of Buffalo: One copy on the bulletin board at the easterly entrance to the city and county hall; one copy on the bulletin board at the entrance to the Real Estate exchange on Pearl street; one copy on the bulletin board at the entrance to the municipal building on Delaware avenue.

X. That pursuant to such notice the plaintiff caused the said certificates and each thereof to be offered for sale at public auction at the time and place in said notice mentioned, there being present at such time and place the representatives of the plaintiff, Loran L. Lewis, Jr., attorney for the defendant, Adelbert Moot, attorney for the Levi executors and Louis E. Levi, one of the executors in person. That said sale was duly conducted and said certificates sold to the

plaintiff for the sum of forty-four thousand dollars, that being the highest sum bidden therefor.

XI. That after said sale and on the same day, the secretary and attorney for the plaintiff took said certificates of stock to the defendant, and demanded of the president and cashier of the defendant that said stock be transferred on the books of the defendant from Levi to the plaintiff, at the same time presenting to such officers the certificates of stock and evidence of the regularity of said sale thereof, and that the defendant and its officers refuse to make such transfer.

XII. That at the time of the sale of the stock in question to and its purchase by the plaintiff, the estate of Emanuel Levi was
22 largely indebted to the defendant, and the defendant claims that it then had and now has a right to a lien upon said certificates of stock as security for the payment thereof; that Levi's indebtedness to the defendant accrued prior to the pledging of any of said certificates to the plaintiff; that no tender or offer to pay said indebtedness by the plaintiff or by any other person or party has ever been made. That the plaintiff was notified of defendant's claim immediately before the sale of June 30th, 1896, and the defendant forbade such sale except subject to defendant's claims, demands and liens.

XIII. That the defendant was organized by articles of association bearing date the 9th day of February, 1865, which were duly approved by the Comptroller of the Currency at Washington, which articles of association contain, among other things the following clause: "That the board of directors shall have power to make all "by-laws that may be proper and convenient for them to make "under said act for the general regulation of the business of the "association and the management and administration of its affairs, "which by-laws may prohibit, if the directors shall so determine, "the transfer of stock owned by any stockholder who may be liable "to this association either as principal debtor or otherwise, without "the consent of the board."

XIV. That on the 18th day of February, 1865, the board of directors of said defendant duly adopted by-laws, among which is the following clause:

"Transfers of stock.—SEC. 15. The stock of this bank, shall
23 "be assignable only on the books of this bank subject to "the restrictions and provisions of the act, and a transfer "book shall be kept in which all assignments and transfers of stock "shall be made. No transfer of the stock of this association shall "be made without the consent of the board of directors by any stock-"holder who shall be liable to the association either as principal "debtor or otherwise, which liability shall be a lien upon the said "stock and all profits thereof, and dividends and certificates of stock "shall contain upon them notice of this provision."

XV. That on the 1st day of October, 1890, the said Emanuel Levi was indebted to the defendant in the sum of thirty-one thousand dollars, which had existed, in whole or in part, since May 1st, 1890,

and as security for the payment thereof, the said defendant held promissory notes of the said Emanuel Levi. That upon the 1st day of October, 1890, the said Emanuel Levi applied for a further loan of twelve thousand dollars, and proposed to secure the same by note made by himself and endorsed by his son, Louis Levi, and to treat and consider as delivered to the defendant the stock which he owned in the defendant corporation, and which was then in the safe deposit vaults of the Buffalo Loan & Trust Company as security for the payment of the said indebtedness of thirty-one thousand dollars, and the loan that day made; and that thereupon, and in reliance upon such further and additional security for the payment of the indebtedness and the endorsement of the paper of the said Emanuel Levi of
24 twelve thousand dollars by his son, Louis Levi, the said defendant made the said loan of twelve thousand dollars and extended the time of payment of the thirty-one thousand dollars old indebtedness.

XVI. The loans which the bank had made were *were* evidenced after the death of Levi by notes in all respects, save as to amount, as follows:

"$16,357.99. BUFFALO, N. Y., *Aug. 17th*, 1896.

On demand after date we promise to pay to the order of Louis E. Levi sixteen thousand, three hundred and fifty-seven and 99 one hundredths dollars, at the Third National Bank of Buffalo, N. Y.

Value received with int.

LOUIS E. LEVI, *Ex.*
ROSA LEVI, *Ex.*"

Endorsed: "Louis E. Levi, Rosa Levi."

At the time of the purchase of the stock by the plaintiff the only claim that the bank had was for a loan evidenced by a note, which the note above set forth was given to renew in part, and which was in the above form; also, the alleged claim of the bank upon the bank stock of said Levi as security for such loan; also, the stock of Levi in the German bank and German Insurance Company, which had been assigned to it as collateral security.

XVII. That said defendant held as security for the said indebtedness of the said Levi's stock in the German bank and in the Buffalo German Insurance Company upon which and in full thereof there was realized by said bank on the 13th day of February, 1900,
25 the sum of nine thousand dollars and on the 14th day of February, 1900, the sum of eight hundred and thirty-seven dollars.

That the said defendant bank received from dividends upon the said stock of the German bank and upon the stock of the Buffalo German Insurance Company, certain amounts at different times down to the 14th day of February, 1900.

That after the application of the said sums realized from the sale of the said German Bank stock and said German Insurance Com-

pany's stock, and from dividends received thereon, there was due said Third national bank upon said Levi's indebtedness, the sum of nine thousand, eight hundred, eighty-six and $\frac{33}{100}$ dollars as of February 14, 1900, for which sum said bank claims a lien on said stock, and which sum it claims to have extinguished by the application of dividends declared on said Levi stock in said Third national bank.

XVIII. That the Third National Bank of Buffalo has declared dividends upon the stock of said Levi since the first day of July, 1896, as follows: $1350.00 on July 10th, 1896; $1350.00 on January 2nd, 1897; $1350.00 on July 1st, 1897; $1350.00 on January 3rd, 1898; $1350.00 on July 1st, 1898; $1350.00 on January 3rd, 1899; $1350.00 on July 1st, 1899, and $1350.00 on January 1st, 1900. That none of said dividends have been paid to the plaintiff. That ever since the issue of said stock to Levi the defendant has paid all dividends, interest and profit thereon to said Levi, or his estate, until July 1st, 1896. That said plaintiff did not at any time until
26 June 30, 1896, demand of said defendant a transfer of said stock, or any part thereof, or the payment to it of any dividend thereon.

XIX. That said dividends on said stock declared by the defendant since July 1st, 1896, with interest thereon from the date on which they were declared to the day of trial, amount in the aggregate to the sum of $12,135.83.

As conclusions of law, from the foregoing facts, I find and decide:

First. That by and through the pledge of said stock of the plaintiff, and the sale thereof, on the 30th day of June, 1896, the plaintiff became, and was the owner of said certificates of stock, and each and all thereof, and was entitled to a transfer thereof on the books of the defendant.

Second. That the dividends declared on said stock by defendant on and since July, 1896, belong to and are the property of the plaintiff, and amount with interest to the sum of $12,135.83.

Third. That the plaintiff is entitled to judgment directing the defendant to transfer the said certificates of stock, and each and every of them upon the books of said defendant, to the plaintiff, and for judgment in favor of the plaintiff against the defendant, for the sum of $12,135.83, together with the costs of this action to be taxed.

Let judgment be entered herein accordingly.

Dated, Buffalo, N. Y.

JOHN S. LAMBERT,
Justice Supreme Court.

27 Supreme Court, Erie County.

THE BUFFALO GERMAN INSURANCE COMPANY
against
THIRD NATIONAL BANK OF BUFFALO.

The issues in this action having been brought on for trial before the Honorable John S. Lambert, at an equity term of this court, held in and for the county of Erie, on the 25th day of April, 1900,

and the proofs and allegations of the respective parties having been heard, and after due deliberation thereon, the court having filed its decision dated October 12th, 1900, directing this judgment, and the costs of this action having been taxed at the sum of $1391.44, now upon motion of Hickman and Palmer, attorneys for the plaintiff, it is

Ordered and adjudged, that by and through the pledge of Emanuel Levi to the plaintiff, of the capital stock of the defendant, evidenced by the certificates of the stock of the defendant, numbered B 58 for one hundred shares, B 59 for one hundred shares, B 60 for one hundred shares, B 61 for one hundred shares and B 62 for fifty shares, said shares being of the par value of one hundred dollars each, and which said certificates are described in the complaint and decision herein and the sale thereof by the plaintiff on the 30th day of June, 1896, the plaintiff became, and was the owner of each
28 and all of said certificates of stock, and was and is entitled to a transfer thereof on the books of the defendant, upon said certificates being tendered for surrender and cancellation.

And it is further ordered and adjudged, that the dividends declared by the defendant in July, 1896, and since then, down to the trial of this action, amounting to the sum of $12,135.83, belong to, and are the property of the plaintiff.

It is further ordered and adjudged, that upon the tender of said certificates or any of them, by the plaintiff or its agents or assigns, to the defendant, the defendant shall, upon request so to do, transfer the said certificates of stock, and each and every of them, on the books of the defendant, to the plaintiff or its agents or assigns as it may direct, and issue new certificates of stock therefor to the plaintiff, its agents or assigns.

And it is further ordered and adjudged, that the plaintiff, The Buffalo German Insurance Company, recover of the defendant, Third National Bank of Buffalo, the sum of $12,135.83, being the amount of dividends on said stock to the date of this trial, together with the sum of $1391.44 costs and disbursements in this action, amounting in the whole to the sum of $13,527.27, and that it have execution therefor.

Judgment signed this 16th day of October, 1900.

FRANK P. MARQUIS, *Dep. Clerk.*

29 Supreme Court, Erie County.

BUFFALO GERMAN INSURANCE COMPANY
against
THE THIRD NATIONAL BANK OF BUFFALO.

The defendant in the above entitled action hereby excepts to the conclusions of law in the above entitled action as made by his honor, John S. Lambert, justice, supreme court, dated Buffalo, N. Y., as follows:

First. Said defendant excepts to the first conclusion of law and to each and every part thereof.

Second. Said defendant excepts to the second conclusion of law and to each and every part thereof.

Third. Said defendant excepts to the third conclusion of law and to each and every part thereof.

LEWIS & LEWIS,
Attorneys for Defendant, 23–25 Erie Co. Sav. Bank Building, Buffalo, N. Y.

To Hickman & Palmer, attorneys for plaintiff, and to Otto H. Wende, clerk of county of Erie.

30 Supreme Court, Erie County.

BUFFALO GERMAN INSURANCE COMPANY
against
THIRD NATIONAL BANK OF BUFFALO.

Please take notice that the Third National Bank of Buffalo appeals to the appellate division of the supreme court, fourth department from the judgment in this action signed the 16th day of October, 1900, and entered in Erie county clerk's office on that day, which orders and adjudges that by and through the pledge of Emanuel Levi to the plaintiff of the capital stock of the defendant evidenced by certificates of stock of the defendant, and which said certificates are stated in said judgment as being described in the complaint and the decision herein, and the sale thereof by the plaintiff on the 30th day of June, 1896, the plaintiff became the owner of each and all of said certificates of stock and was and is entitled to a transfer thereof on the books of said defendant upon said certificates being tendered, for surrender and cancellation, and which further orders and adjudges that the dividends declared by the defendant on July, 1896, and since then down to the trial of this action, amounting to the sum of $12,135.83, belong to and are the property of the plaintiff, and which further orders and adjudges that upon the tender of said certificates, or any of them, by the plaintiff, or its agents or assigns, to the defendant, the defendant shall, upon request so to do, transfer said certificates of
31 stock and each and every of them on the books of the defendant to the plaintiff, or its agents or assigns, as it may direct, and issue new certificates of stock therefor to the plaintiff, its agents or assigns, and which further orders and adjudges that the plaintiff, Buffalo German Insurance Company, recover of the defendant, The Third National Bank of Buffalo, the sum of $12,135.83, being the amount of dividends on such stock to the date of this trial, together with the sum of $1391.44, costs and disbursements in this action, amounting in all to the sum of $13,527.27, and that it have execution therefor.

And you will please take notice that the said defendant appeals

from the whole of said judgment and from each and every part thereof.

Dated, Buffalo, N. Y., October 29, 1900.

LEWIS & LEWIS,
Attorneys for Defendant, 23–25 *Erie Co. Sav. Bank Bldg., Buffalo, N. Y.*

To Hickman & Palmer, attorneys for plaintiff, and
To Otto H. Wende, county clerk, Erie county.

32 STATE OF NEW YORK, *Erie County Clerk's Office*, } ss.:

I, Otto H. Wende, clerk of said county, do hereby certify that I have compared the annexed copy of judgment roll, exceptions to decision and notice of appeal and copy indorsements thereon, with an original thereof, entered and on file in this office, and find the same to be true transcripts of and from the said originals, and the whole of each thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said county, at Buffalo, this 15th day of December, A. D. 1900.

[SEAL.] OTTO H. WENDE, *Clerk.*

(Stamp.)

33 At a term of the appellate division of the supreme court, held in and for the fourth judicial department, at the city of Rochester, on the 4th day of April, 1901.

Present: Hon. William H. Adams, presiding justice. Hon. Peter B. McLennan, Hon. Alfred Spring, Hon. Pardon C. Williams, Hon. Frank C. Laughlin, associate justices.

THE BUFFALO GERMAN INSURANCE CO., Respondent, *vs.* THE THIRD NATIONAL BANK OF BUFFALO, Appellant. } Order of Affirmance on Appeal from Judgment.

The above named, The Third National Bank of Buffalo, the appellant in this action having appealed to the appellate division of the supreme court from a judgment of the supreme court entered in the office of the clerk of the county of Erie, on the 16th day of October, 1900, and the said appeal having been argued by Mr. George L. Lewis, of counsel for the appellant and by Mr. Arthur W. Hickman, of counsel for the respondent, and due deliberation having been had thereon,

It is hereby ordered and adjudged that the judgment so appealed from be and the same is hereby affirmed; and the respondent recover of the appellant the costs of this appeal.

All concur.

[L. S.] NEWELL C. FULTON, *Clerk.*

34 Supreme Court, Erie County.

THE BUFFALO GERMAN INSURANCE COMPANY
against
THIRD NATIONAL BANK OF BUFFALO.

The defendant in the above entitled action having appealed to the supreme court, appellate division, fourth department, from the whole and each and every part of the judgment rendered in said action upon the trial thereof before Hon. John S. Lambert, at a special term for the trial of issues of fact, held in and for the county of Erie, on the 25th day of April, 1900, and which judgment was entered in the office of the clerk of the county of Erie, on the 16th day of October, 1900, and the said appeal having been noticed for argument before the said appellate division at the term thereof beginning on the 12th day of March, 1901, and having been argued before the justices of the appellate division of the supreme court for the fourth department, at the city of Rochester, New York, on the 2nd day of April, 1901, duly made an order affirming the judgment so appealed from, with costs to the plaintiff and respondent, and the costs of the plaintiff having been adjusted at the sum of one hundred, thirteen and seventy-five one-hundredths dollars, now on motion of Hickman & Palmer, attorneys for the plaintiff, it is

Ordered and adjudged, that the judgment of the supreme court in the above entitled action, entered in the office of the clerk of
35 the county of Erie, on the 16th day of October, 1900, be, and the same hereby is in all things and respects affirmed, and that the plaintiff, The Buffalo German Insurance Company, recover of the defendant, Third National Bank of Buffalo, the sum of one hundred, thirteen and seventy-five one-hundredths dollars costs on said appeal, and that the plaintiff have execution therefor.

Judgment signed this 10th day of April, 1901.

FRANK P. MARQUIS,
D. P. Clerk.

Take notice that an order and judgment duly granted in the within entitled action, with true copies of which you are herewith served, were this day entered in the office of the clerk of the county of Erie at Buffalo, N. Y.

Dated, April 10, 1901.

HICKMAN & PALMER,
Plaintiff's Attorneys.

To Lewis & Lewis, Esqs., defendant's attorneys.

36 Supreme Court, Erie County.

THE BUFFALO GERMAN INSURANCE CO., Respondent,
vs.
THE THIRD NATIONAL BANK OF BUFFALO, Appellant.

You will please take notice that The Third National Bank of Buffalo, the above named appellant, appeals to the court of appeals of the State of New York from an order of the appellate division, of the supreme court, fourth department, herein entered in the office of the clerk of the county of Erie, on the 10th day of April, 1901, affirming, with $93.75 costs, the judgment in this action entered in the clerk's office of the county of Erie, on the 16th day of October, 1900, in which it was adjudged that the plaintiff, Buffalo German Insurance Company, recover of the defendant, Third National Bank of Buffalo, the sum of $12,135.83, together with $1391.44 costs and disbursements in said action, and the said appellant appeals from the whole of said order and from each and every part thereof.

You will also please take notice that the appellant appeals to the court of appeals of the State of New York from a judgment entered upon said order in the office of the clerk of the county of Erie, on the 10th day of April, 1901, affirming, with $93.75 costs, the judgment in this action entered in the office of the clerk of the county of Erie on the 16th day of October, 1900, in which it was ad-
37 judged that the plaintiff, Buffalo German Insurance Company, recover of the defendant, The Third National Bank of Buffalo, the sum of $12,135.83, together with $1391.44 costs and disbursements in said action, and the said appellant appeals from the whole of said judgment and from each and every part thereof.

Dated Buffalo, N. Y., October 4, 1901.

Yours, etc.,

LEWIS & LEWIS,
Attorneys for Appellant,
23–25 *Erie Co. Savings Bank Bldg., Buffalo, N. Y.*

To Messrs. Hickman & Palmer, attorneys for respondent, and to the clerk of the county of Erie.

It is hereby stipulated by and between the parties hereto, by their attorneys, that the foregoing papers, remittitur from the appellate division, fourth department, order of the appellate division upon affirmance, the judgment of the supreme court upon the order of affirmance, and the notice of appeal to the court of appeals, are true and correct transcripts and copies of and from the original and of the whole thereof, and which said papers are entered and on file in Erie county clerk's office, and that the foregoing printed papers constitute the proper papers on appeal, and the whole thereof, and that they may be used upon the argument of this appeal in the court of appeals, with the same force and effect as though the same were cer-

tified to by the clerk, and that the certification thereof is, pursuant to section 3301 of the Code of Civil Procedure, hereby waived.

Dated November 30, 1901.

HICKMAN & PALMER,
Attorneys for Respondent.
LEWIS & LEWIS,
Attorneys for Appellant.

38 Thereupon, the court rendered the following judgment:

Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 10th day of June, in the year of our Lord one thousand nine hundred and two, before the judges of said court.

Witness, the Hon. Alton B. Parker, chief judge presiding.
W. H. SHANKLAND, *Clerk.*

Remittitur, June 11th, 1902.

THE BUFFALO GERMAN INSURANCE COMPANY, Respondent,
against
THE THIRD NATIONAL BANK OF BUFFALO, Appellant.

Be it remembered, that on the 2nd day of December, in the year of our Lord one thousand nine hundred and one, The Third National Bank of Buffalo, the appellant in this action, came here into the court of appeals, by Lewis and Lewis, its attorneys, and filed in the said court a notice of appeal and return thereto from the order and judgment of the appellate division of the supreme court in and for the fourth judicial department. And The Buffalo German Insurance Company, the respondent in said action afterwards appeared in said court of appeals by Hickman and Palmer, its attorneys.

Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon, the said court of appeals having heard this cause argued by Mr. George L. Lewis, of counsel for the appellant, and by Mr. Arthur W. Hickman, of counsel for the respondent, and
39 after due deliberation had thereon, did order and adjudge that the judgment of the appellate division of the supreme court appealed from herein be, and the same hereby is affirmed, with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be, and the same hereby is, affirmed, with costs, as aforesaid.

And hereupon, as well as the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Court of appeals, clerk's office.

ALBANY, *June 11th*, 1902.

I, hereby certify, that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein, attached thereto.

[SEAL.] W. H. SHANKLAND, *Clerk.*

40 Whereupon, the court of appeals affirmed with costs the judgment herein appealed from, upon the opinion of the court delivered on the decision of a former appeal reported in 162 N. Y. 163, in words and figures as follows, to wit:—

41 In the Court of Appeals of the State of New York.

BUFFALO GERMAN INSURANCE COMPANY, Respondent,
against
THIRD NATIONAL BANK OF BUFFALO, N. Y., Appellant.

Opinion reported in 162 N. Y., p. 168.

GRAY, *J.*:

The decision of the question in this case turns upon provisions of the national banking act, passed by Congress in 1864, and the construction which they should receive, in the light of opinions of the Supreme Court of the United States. The original act for the incorporation of national banks, which was passed in 1863, contained, in section 36, the provision that the capital stock "shall be assignable on the books *the books* of the association in such manner as its by-laws shall prescribe, but no shareholder in any association under this act shall have power to sell or transfer any share held in his own right so long as he shall be liable, either as principal debtor, surety or otherwise, to the association for any debt which shall have become due and remain unpaid * * * and no stock shall be transferred without the consent of a majority of the directors while the holder thereof is thus indebted to the association." In 1864, the act of 1863 was repealed by a new enactment as to national banking associations, whereby it was provided, in section 35, "that no association shall make any loan or discount on the security of the shares of its own capital stock, nor be purchaser or holder of any such

shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith," etc. (16 U. S. Stat. at Large, 110). The act of 1864 did not re-enact
42 any of the provisions which were contained in section 36 of the act of 1863 and the section, therefore, was expressly repealed. (*Bullard v. Bank*, 18 *Wall., at p.* 594.)

The defendant was organized under the act of 1864 and there was, not only, no authority in the act for the by-law referred to, and embodied in the language of the certificates of stock, but such a by-law would be inconsistent therewith. (*Bullard v. Bank, supra.*) The restrictions imposed by section 36 of the act of 1863 upon the shareholders had been removed and banking associations were prohibited from permitting any indebtedness on the part of their stockholders upon the security of the shares of their own capital stock. It would seem, therefore, that a by-law seeking to impose restrictions upon transfers of stock, by declaring a lien upon the stock to the extent of any liability of the stockholder to the bank, would be quite inoperative to accomplish such a purpose and, equally so, any statement upon the certificate of stock based upon the existence of such a by-law. The bank being prohibited from loaning moneys upon the security of its own shares of capital stock, it is difficult to understand upon what legal principle it could claim the right to an equitable lien. The appellate division, in an opinion which was concurred in by the majority of the justices of that court, thought that, as the question was one which arose under a Federal law, it should be governed in its determination by the decisions of the supreme Federal court and that the more recent ones had established a controlling doctrine that a contract made in contravention of any provision of the national banking act is not in the absence of any declaration to that effect, void, or incaple of enforcement. Under the authority of certain cases in the United States Supreme Court, which are considered in the opinion, it was pointed out that the validity of certain transactions by
43 national banks with their debtors was held to be a question only for the Government to raise and that the effect of their violation of the statute was not to invalidate the transaction itself, but to subject them to charter proceedings on the part of the Government. (*Bank v. Matthews*, 98 *U. S.* 621; *Bank v. Whitney*, 103 *ib.* 99; *Thompson v. Bank*, 146 *ib.* 240.) Hence, it was deemed to follow that, in the present case, the bank's claim to be entitled to an equitable lien, though against a purchaser for value and in good faith of its shares in the market, must be allowed and any offense against the banking act involved must be left to governmental cognizance. I believe this conclusion to be fallacious and that the reasoning of the learned justices below is without regard to the distinction which exists between those cases, in their facts and in the principle underlying their decision, and the earlier cases which construed the national banking acts and declared the doctrine that loans by banking associations to their stockholders do not give a lien to the bank upon their stock. (*Bank v. Lanier*, 11 *Wall.* 369;

Bullard v. Bank, supra.) I am quite unable to agree in the view that these earlier cases have been overruled, or their doctrine refused credit, by the later cases which are relied upon for the defendant. If we assume the existence of a contract between the defendant bank and Levi, (and all we know of it is the testimony of the president of the defendant as to a conversation with Levi, in which he said the bank could consider the stock in his safe as collateral for his loans), it was executory in its nature as long as the stock remained in his possession and until it was in fact pledged to the bank by a delivery. Possession is of the essence of a pledge in order to raise a privilege against third persons. (*Casey v. Cavaroc*, 96 *U. S.* 467; *Wilson v. Little*, 2 *N. Y.* 443.)

The defendant is asking the court to declare an equitable lien in its favor upon the shares of stock against a third person and, 44 in that respect, the case is unlike those cases where the Federal court has held that a national bank might enforce a security which it had taken and held, notwithstanding the claim of the borrower that the transaction was in violation of some express provision of the law. The defendant never had possession of the stock and being under the prohibition of the banking act as to a transaction of a loan upon the security of its own shares of stock, it is compelled to take the position that, having dealt with Levi upon the faith that his ownership of the stock would be an added security for the performance of his promise to pay his loans and the certificates of stock carrying notice to persons dealing with Levi with respect to them that any transfer thereof would be subject to a lien in favor of the bank for any liability of the stockholder, it should be allowed an equitable lien thereon, superior to any right of the plaintiff thereto.

I should say that there was a marked difference between any such claim of the bank, which slights a provision of the banking law, intended to negative the right to a lien and to confer the valuable character of transferability upon national bank shares, in the public interests, and a claim which a borrower, or his representative, asserts against the right of a national bank, as his creditor, to realize its debt upon securities which have been held by it in pledge, though not within the class of those it was authorized to hold. The demand of the bank is to have the court declare an equitable lien upon its outstanding stock, by virtue of a by-law and of notice thereof on the certificates, when the banking act prohibited loans by it upon the security of its own shares and thereby rendered any by-law in contravention of the act, or any notice based thereon, wholly inoperative.

In *Bank v. Lanier*, (*supra*,) the certificate of stock declared that the shares were transferable on the books of the bank *only on* 45 *surrender of the certificates:* This limitation was imposed by the by-laws; which, further, provided that the stock of the bank should be assignable, subject to the provisions and restrictions of the 36th section of the act of 1863. Lanier and Handy purchased the stock of Culver, to whom it had been issued, and, their

request for a transfer being refused, an action was brought against the bank to obtain pecuniary satisfaction. The bank defended upon the ground that it had a lien upon the stock for Culver's indebtedness to it, by virtue of the provisions of the 36th section of the act of 1863; which remained in operation, notwithstanding its repeal in 1864, by means of a by-law, adopted while the section was in force, declaring that the stock should be transferable subject to the provisions and restrictions of the act of Congress aforesaid. It appeared that the bank had sold and transferred the Culver shares upon its books to a third person and had applied the proceeds of the sale upon the indebtedness, before Culver assigned the certificates to Lanier and Handy. It was held that the provisions of the act of 1864 governed the conduct of banking associations, whether they were organized before or after it became a law, and that the prohibition upon the making of loans on the security of the shares of their own capital stock applied. The object of the new act was stated to be, to make national banks subserve public purposes and to place shareholders, in their pecuniary dealings with the bank, on the same footing with other customers. It was a change in the policy of the Government and as the restrictions of the act of 1863 fell, "so did that part of the bank's by-law relating to the subject fall with them." The judgment against the bank was affirmed.

In *Bullard v. The Bank*, (*supra*), the defendant was organized under the national banking act of 1864, and issued to one Clapp certain shares of its capital stock. He borrowed moneys from
46 the bank on his notes and subsequently was adjudged a bankrupt. The plaintiff as his trustee in bankruptcy, demanded a transfer of the stock to him as part of the bankrupt's assets; but the bank refused, claiming a lien upon it by force of its by-law, to the extent of the notes held by it. The action was then brought against the bank for refusing to allow the transfer asked for and the questions certified for determination were, whether a national bank could acquire a valid lien upon the shares of its stockholders by its articles, or by-laws and whether the bank was entitled to hold the interest of Clapp in the stock by way of lien, or security, for all, or any of the notes. It was held, on the authority of the *Lanier Case* (*supra*), that these questions must be answered in the negative. Mr. Justice Strong, who delivered the opinion of the court, observed that the repeal of the 36th section of the act of 1863 by the substituted act of 1864 "was a manifestation of a purpose to withhold from banking associations a lien upon the stock of their debtors;" and that a by-law founded upon the 36th section of the act of 1863 was "a regulation inconsistent with the new currency act, *the policy of which was to permit no liens in favor of a bank upon the stock of its debtors.*" It was there argued for the bank that, though the act of Congress does not itself create a lien on a debtor's stock, (as did the act of 1863), it does by its fifth section authorize the creation of such a lien by the articles of association, and by by-laws made under them. But it was answered that the words of the fifth section would bear no such meaning and that a by-law giving to the bank a lien

upon its stock, as against indebted stockholders, ought not to be considered as one of those regulations of the business of the bank, or for the conduct of its affairs, which it was authorized to adopt, and that Congress evidently did not understand the section as extending to the subject of stock transfers; because in another part of the statute express provision was made for them.

The doctrine of *Lanier v. The Bank* was followed in this
47 court in *Conklin v. Second Nat. Bank*, (45 N. Y. 655); where the stock certificates contained the statement that the stock was not transferable "until all liabilities of the stockholder to the bank are paid." The rule of the *Lanier* case was held applicable to the transaction between the bank and the plaintiff's assignor, and it was held, against the claim of the bank to a lien upon the stock for moneys due from the stockholder, that "where the statute has prohibited all express agreements between a bank and its stockholders for a lien in favor of the former upon the stock of the latter, to secure any debts or liabilities of the stockholders to the bank, that no such lien can be created by a mere by-law of the bank, is too clear to require discussion."

Do the cases which are cited and relied upon below as establishing a new doctrine apply to the present case and come to the support of the defendant's position? They are *Bank v. Matthews* (98 U. S. 621) and *Bank v. Whitney* (103 *ib.* 99). The national banking law authorizes a national banking association to loan money on personal security, and then declares that "it may purchase hold and convey real estate for the following purposes, and no others; *first*, such as may be necessary for its immediate accommodation in the transaction of its business; *second*, such as shall be mortgaged to it in good faith by way of security for debts previously contracted; *third*, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; *fourth*, such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts to it." In the case of *Bank v. Matthews* — and another person had given their joint note to a mercantile company and secured it by a deed of trust covering certain real property, executed by Matthews alone. Subsequently, the company assigned the note and deed of trust to the defendant bank to secure a loan made at the time. The loan was not paid and the bank directed the
48 trustee to sell. In the State courts Matthews obtained a perpetual injunction against the sale, upon the ground that the loan was made upon real estate security, which was forbidden by the statute, and the deed of trust was, therefore, void. The case was taken by writ of error to the United States Supreme Court, where the decree of the State court was reversed and the cause remanded, with direction to the court below to dismiss the bill. It was held that the prohibitory clause of the national banking law did not vitiate real estate securities taken for loans, and that a disregard of the law only laid the association open to proceedings by the Government. Justice Swayne remarked that "The impending

danger of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by Congress." The guiding principle of the decision, however, was that it would be inequitable that a borrower should be rewarded, by giving success to his defense of the invalidity of the bank's act in taking a prohibited security for its loan, and that, as a punishment was prescribed for the violation of its charter, it was for the Government to object. (See p. 629.)

In *Bank v. Whitney*, Whitney had executed a mortgage to the bank, which declared that it was made as collateral security for the payment of all notes which the bank held at the time against him and for his other indebtedness then due, or thereafter to become due. The question for determination was stated to be whether the mortgage was valid so far as it applied to future advances to him. The question was regarded as determined by the decision in *Bank v. Matthews*, which was reviewed in the opinion. It was observed that, "Whatever objection there may be to it, as security for such advances, from the prohibitory provisions of the statute, the objection can only be urged by the Government." In both of these cases, the bank held the trust deed, or mortgage, and was endeavoring
49 to enforce the security which it actually had taken from its debtor.

In *Bank v. Stewart*, (107 U. S. 676), the bank had taken, as security for a debt due from the stockholder, thirty shares of its own stock and, upon default in payment, *had sold the same and applied the proceeds in payment of the debt*. The action was brought to recover back the proceeds of the sale, upon the ground that the bank had no right to take the security. The right to recover was denied, upon the ground that "the contract had been executed, the security sold and the proceeds applied to the payment of the debt," and that "both bank and borrower are in such case equally the objects of legal censure and they will be left by the courts where they have placed themselves." By suing for the proceeds of the sale, it was observed, the plaintiffs had affirmed the sale and the moneys loaned were an offset to the proceeds.

In Thompson *v.* Bank, (146 U. S. 240), the question arose upon the overcertification of a check, in violation of the United States statute; which made it "unlawful for any officer, etc., of any national bank to certify any check drawn upon said bank, unless the person or company drawing said check shall have on deposit in said bank, at the time such check is certified, an amount of money equal to the amount specified in such check." The ststute, further, provided that any check so certified shall be a good and valid obligation against said bank; but that any officer, etc., violating the provisions of the act would subject the bank to proceedings on the part of the comptroller for the appointment of a receiver to wind up the affairs of the association. (13 Stat. 114, c. 106.) The action was brought to recover the possession of certain railroad bonds, which the bank was charged with having become illegally possessed of. The bank answered that the bonds had been pledged to

it as collateral security for call loans or advances, and that the pledgors having failed to pay their indebtedness, the
50 *bonds had been sold under an agreement* permitting the bank to do so upon the pledgor's default. The question was, whether, inasmuch as the defendant had certified checks without having on deposit an equivalent amount of money to meet them, it became a *bona fide* holder of the bonds. Upon the authority of the cases of *Bank v. Matthews* and *Bank v. Whitney*, it was held that "where the provisions of the national banking act prohibit certain acts by banks, or their officers, without imposing any penalty or forfeiture applicable to particular transactions *which have been executed*, their validity can be questioned only by the United States, and not by private parties." This clause from the opinion is quoted below in the present case, but I fail to perceive its precise applicability. The transaction, as in *Bank v. Stewart*, had been executed. *Matthews v. Bank* and *Bank v. Whitney*, only of these cases, might be claimed to have a bearing upon the discussion; but their analogy is not apparent. I do not think that the United States Supreme Court intended to announce any new rule; for they simply applied a doctrine established as early as in the case of *Fleckner v. Bank*, (8 Wheaton, 339). That the *Matthews* and *Whitney* cases have not overruled the doctrine of the *Lanier* and *Bullard* cases, or of the *Conklin* case in this court, with respect to the enforcibility of such a by-law as the bank had in this case, is the general understanding of text-writers and it has been so understood by courts. (Cook on Stockholders, 3d ed., sec. 533; Jones on Liens, 2d ed., ≠ 384; Thompson's Commentary on the Law of Corporations, ed. of 1894, §2319; Paine's Banking Laws, p. 533; American & English Enc. of Law, vol. 16, p. 533; American & English Enc. of Law, vol. 16, p. 201, ≠≠ 14, 15; *Evansville National Bank v. Metropolitan National Bank*, 2 Bissell, 527; *Continental Bank v. Eliot Bank*, 7 Fed. Rep. 376; *New*
51 *Orleans National Banking Association v. Wilts*, 10 Fed. Rep. 330; *Feckheimer v. Nat. Ex. Bank of Norfolk*, 79 Va. 80.)

I do not understand that, by virtue of any rule established in the *Matthews* and *Whitney* cases, a national banking association is enabled, by force of a by-law, or by a notice upon certificates, to restrict the transferability of its stock by imposing a lien thereon for any liability owing to it by its stockholder. How can it reserve to itself a right to a lien upon shares of its own stock, in contravention of the provisions of the national banking act, and become entitled to demand of the courts to enforce it as against a purchaser of the shares, whose title thereto is acquired *bona fide* and for value? If the defendant bank can successfully insist upon the right to an equitable lien, which the courts must enforce, in the face of the statutory prohibition, then I do not see that certificates of capital stock in national banking associations will possess that marketable character, which has been considered to give them a greater value as investments. The transferability of the stock is one of the most valuable franchises conferred by Congress upon banking associations, as it was said by Justice Davis in the *Lanier* case. The learned

judge further remarked, in that case: "It is no less the interest of the shareholder, than the public, that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage." Nor can it be said that this plaintiff, when offered by Levi the certificates of stock as collateral security for a loan of money, was chargeable with notice of any lien of the bank thereon. The certificates were in his possession, and were delivered to the plaintiff, and the printed matter thereon was of no importance; inasmuch as the public law, under which the bank was organized, prohibited it from making
52 any loan or discount on the security of the shares of its own capital stock. The plaintiff could not be bound by notice of something which the law prohibited.

The plaintiff, in the language of Justice Davis in the Lanier case, was "told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know, that whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in the possession of the certificates."

If the case had been one where the bank, not regarding the prohibition of the banking act, had taken from Levi his certificates of stock, as collateral security for the payment of any indebtedness which he had incurred, or might incur, and had realized upon them for application upon his debt, it might well be that it would not lie in his mouth, or any one claiming under him, to assert the illegality of the transaction. The case would then resemble more the cases of *Bank v. Matthews* or *Bank v. Stewart*. If the bank had violated the law, it laid itself open to proceedings on the part of the Government and the courts might leave the parties where they were, and might decline to interfere to benefit the borrower to the prejudice of the stockholders and creditors.

There is no conflict between the Lanier and Bullard cases and the Matthews and Whitney cases. Each class is distinct and its doctrine is controlling where the principle involved is the same. It is one thing if the contract has been executed and to avoid it would be to deplete the assets of the bank to the amount represented by
53 the contract; it is quite another thing, where the bank is seeking to create a lien upon an implied executory contract, or a security where it has none, and where it admits it has none, in the face of the statute, which provides that it shall not have such a lien, or take such a security.

The conclusion I reach is that the cases relied upon in the court below, in the decision of this case, do not control it. They do not authorize the assertion of an equitable lien by the bank upon the shares of its own capital stock and the plaintiff, having acquired

the certificates from Levi, the stockholder, for value and in good faith, was entitled to have the same absolutely transferred into its name upon the books of the corporation.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

Parker, Ch. J., Bartlett, Martin, Vann, Cullen and Werner, JJ., concur.

Judgment reversed, etc.

54 [Endorsed:] In the court of appeals, State of New York. Buffalo German Insurance Co. against Third National Bank of Buffalo Copy. Opinion. Lewis & Lewis, appellant's attorneys, 23–25 Erie Co. Savings Bank building, Buffalo, N. Y.

55 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the hon. judges of the court of appeals of the State of New York, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said court of appeals, State of New York, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Buffalo German Insurance Company, plaintiff, and The Third National Bank of Buffalo, N. Y., defendant, wherein was drawn in question, the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such, their validity; or wherein was drawn in question, the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said defendant, The Third National Bank of Buffalo, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid,

56 with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of September, in the year of our Lord one thousand nine hundred and two.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS,
Clerk of the United States Circuit Court
for the Second Circuit.

Allowed, (to operate as a supersedeas,) by
ALTON B. PARKER,
Chief Judge of the Court of Appeals, State of New York.

57 In the Supreme Court, United States.

THE BUFFALO GERMAN INSURANCE COMPANY
against
THE THIRD NATIONAL BANK OF BUFFALO.

To the honorable chief judge of the court of appeals of the State of New York:

The petition of the Third National Bank of Buffalo respectfully shows:

That on the 11th day of June, 1902, the court of appeals of the State of New York rendered a judgment against your petitioner in a certain case wherein The Buffalo German Insurance Company was plaintiff, and your petitioner was defendant, affirming the judgment of the appellate division, fourth department, which affirmed the judgment of the supreme court in this action, whereby it was adjudged that by and through the pledge of one Emanuel Levi, to the plaintiff, The Buffalo German Insurance Company, of certain shares of the capital stock of the defendant, numbered B 58 for 100 shares, B 59 for 100 shares, B 60 for 100 shares, B 61 for 100 shares, and B 62 for 50 shares, said shares being of the par value of $100.00 each, the plaintiff became and was the owner of each and all of said shares of stock and was and is entitled to a transfer of said stock on the books of the defendant, your petitioner, upon said certificates being tendered for surrender and cancellation, and whereby it was further ordered and adjudged that the dividends declared by the defendant, your petitioner, in July, 1896, and since then down to the trial of this action in said supreme court, Erie county, amounting to the sum of $12,135.83 belong to and are the property of the plaintiff, and whereby it was fur-
58 ther ordered and adjudged that upon the tender of said certificates, or any of them, by the plaintiff or its agents or assigns to the defendant, your petitioner, the defendant, your petitioner, shall, upon the request to do so, transfer the said certificates of stock, and each and every of them, on the books of the defendant, your petitioner, to the plaintiff, or its agents or assigns as it may direct, and issue new certificates of stock therefor to the plaintiff, its agents or assigns, and

whereby it was further ordered and adjudged that the plaintiff, The Buffalo German Insurance Company, recover of the defendant, your petitioner, The Third National Bank of Buffalo, the sum of $12,135.83 being the amount of dividends on said stock to the date of said trial in the supreme court, Erie county, together with the sum of $1391.44, costs and disbursements, and awarded execution thereon, as will appear by reference to the record of the proceedings of said cause.

That the said court of appeals is the highest court in the State of New York in which a decision in said suit could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under the statutes of the United States authorizing writs of error to State courts, and especially section 709 of the Revised Statutes of the United States, providing that a final judgment or decree in any suit in the highest court in the State in which a decision in the suit could be had, where it has drawn in question the validity of a treaty or statute or an authority exercised under the United States, and the decision is against their validity, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority, may be re-examined or reversed or affirmed in the Supreme Court, upon a writ of error, and because it has ap-

59 peared in the court below that this defendant, your petitioner, is a national banking corporation, organized and existing under an act of Congress authorizing the formation of national banks, which became a law in 1864, and under which your petitioner was incorporated in 1865, and that one Emanuel Levi was the owner of 450 shares of the capital stock of the defendant, evidenced by certain certificates of stock issued to him, and which bear the date, July 2nd, 1888, and it appeared upon the said certificates that it was stated therein that no transfer of the stock of your petitioner, the Third National Bank of Buffalo, shall be made without the consent of the board of directors, by any stockholder who shall be liable to the association, either as principal debtor or otherwise, and that such liability shall be a lien upon the said stock, and upon all profits thereof and dividends.

And it further appeared that Emanuel Levi in December, 1890, borrowed from the Buffalo German Insurance Company the sum of $25,000.00, and on April 13, 1891, the sum of $20,000.00, and on May 25th, 1892, the sum of $10,000.00, giving for such sums his demand notes therefor, and transferring the said certificates of stock owned by him in this defendant, together with an assignment thereof, by which he assigned the same as collateral security for the payment of said loans, and that on June 19th, 1896, there was due and unpaid on said loans $55,000.00 principal, and $300.00 interest, and that thereafter the Buffalo German Insurance Company notified the executors of the said Emanuel Levi, requesting the payment of said loans, and the redemption of said stock before the 16th day of June, 1896, and thereafter served notice of sale upon the executors of said Levi for the sale of the said stock on the 30th day of June,

1896, and posted notices of such sale in three public places in the city of Buffalo, and that on the said day at the time specified offered for sale at public auction said certificates of stock, and were
60 sold to the plaintiff, The Buffalo German Insurance Company, for the sum of $44,000.00, that being the highest sum bid therefor, and thereafter, through its secretary, took the certificates of stock to the defendant, your petitioner herein, and demanded that the stock be transferred on your petitioner's books from said Emanuel Levi to the Buffalo German Insurance Company.

That at the time of the sale of the stock in question and its purchase by the Buffalo German Insurance Company, the estate of Enamuel Levi was largely indebted to your petitioner, and at the time of said sale this defendant, your petitioner claimed and now claims it has the right to a lien upon said certificates of stock as security for the payment of such indebtedness. That said Emanuel Levi's indebtedness to this defendant, your petitiones, accrued prior to the pledging of said certificates of stock to the plaintiff, The Buffalo German Insurance Company. That no tender or offer to pay said indebtedness to this defendant has been made by the Buffalo German Insurance Company, or by any other parties or persons, and that the said plaintiff, The Buffalo German Insurance Company, was notified of your petitioner's claim immediately before the sale on June 30th, 1896, and your petitioner forbade such sale except subject to its claims, demands and liens upon said stock.

That this defendant, your petitioner, was organized in February, 1865, by articles of association approved by the Comptroller of Currency at Washington; that such articles of association contained the following clause:—

"That the board of directors shall have power to make all by-laws that may be proper and convenient for them to make under said act for the general regulation of the business of the association and the management and administration of its affairs, which by-laws may prohibit, if the director shall so determine, the transfer of stock owned by any stockholder, who may be liable to this association, either as principal debtor or otherwise, without the consent of the board."

That on the 18th day of February, 1865, your petitioner's
61 board of directors adopted by-laws, among which is the following:

"The stock of this bank shall be assignable only on the books of this bank, subject to the restrictions and provisions of the act, and a transfer book shall be kept in which all assignments and transfer of stock shall be made.

"No transfer of stock in this association shall be made without the consent of the board of directors, by any stockholder who shall be liable to the association either as principal debtor or otherwise, which liability shall be a lien upon the said stock and all profits thereof, and dividends and certificates of stock shall contain upon them notice of this provision."

That on the 1st day of October, 1890, Emanuel Levi was indebted to the defendant, your petitioner, in the sum of 31,000.00, which had

existed in whole or in part since 1890; that your petitioner held promissory notes of Emanuel Levi on that day for that amount, and on that day the said Levi obtained a further loan of $12,000.00 from this defendant, your petitioner, secured by a note made by himself and endorsed by Louis Levi his son, and proposed to leave and deliver to your petitioner the stock which he owned in your petitioner, which was then in the safe deposit vaults of the Buffalo Trust Company, as security for the indebtedness of $31,000.00, and the $12,000.00 then loaned. That you petitioner, in reliance upon the said additional and further security, made said loan for $12,000.00, and extended the time of payment of the old indebtedness of $31,000.

Your petitioner claims it had and has a valid and subsisting lien on said stock and all the dividends thereof, and the right to apply said dividends to the extinguishment of the balance due it from the estate of Emanuel Levi, contracted herein, as set forth.

62 That the court of appeals of the State of New York has decided that the said Buffalo German Insurance Company by and through the said pledge of stock to it by said Levi on the 30th day of June, 1896, became and was the owner of said certificates of stock, and of all of them, and entitled to a transfer on the books of your petitioner, and the dividends declared upon said stock since July, 1896, amounting to $12,135.83, belonged to the said Buffalo German Insurance Company, and that the said Buffalo German Insurance Company is entitled to have the same transferred upon the books of your petitioner, and is entitled to recover the sum of $12,135.83, and $1391.44 costs.

That your petitioner prays for a writ of error to bring up the record in this action from the court of appeals of the State of New York to this court, that the proceedings thereon may be reviewed, and that your petitioner alleges that error has been made in the decision of said cause by the court of appeals, and it prays that the same may be corrected in this court, and that the lien of your petitioner may be adjudged to be a valid and subsisting lien under and by virtue of the statutes of the United States relative to the incorporation and existence of national banks, and under the statutes by virtue of which your petitioner was organized and exists, all of which appears by the record of the proceedings in said cause, which is herewith submitted.

Wherefore, your petitioner prays the allowance of a writ of error returnable to the Supreme Court of the United States and for citation and supersedeas, and it will ever pray.

Dated, Buffalo, N. Y., August 12th, 1902.

THE THIRD NATIONAL BANK OF BUFFALO, N. Y.,
By CHARLES A. SWEET, *President.*

63 STATE OF NEW YORK, } ss:
County of Erie, City of Buffalo, }

Charles A. Sweet, being duly sworn, doth depose and say: That he is the president of the defendant and petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, excepting as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

CHARLES A. SWEET.

Sworn to before me, this 12th day of August, 1902.
WILLIAM C. CARROLL,
Commissioner of Deeds in & for Buffalo, N. Y.

64 [Endorsed:] In the supreme court of the United States. Buffalo German Insurance Co. against Third National Bank of Buffalo, N. Y. Original petition and writ of error. Lewis & Lewis, defendant's attorneys, 23–25 Erie Co. Savings Bank building, Buffalo, N. Y.

65 In the Court of Appeals of the State of New York.

BUFFALO GERMAN INSURANCE CO., Plaintiff & Respondent, }
against
THIRD NATIONAL BANK OF BUFFALO, Defendant & Appellant. }

The defendant and appellant, Third National Bank of Buffalo, assigns the following errors in the final decision of this court, filed herein upon the 10th day of June, 1902.

I. The court erred in holding and deciding that the plaintiff by and through the pledge of stock and the sale thereof, on the 30th day of June, 1896, became and was the owner of said certificates of stock, and each and all thereof, and was entitled to a transfer thereof on the books of the defendant.

II. The court erred in finding that the dividends declared on said stock by the defendant, on and since July, 1896, belonged to and are the property of the plaintiff, in the amount with interest, of the sum of $12,135.83.

III. The court erred in holding and deciding that the plaintiff is entitled to have the said stock transferred on the books of the defendant to the plaintiff, and to recover of the defendant the sum of $12,135.83 and the costs of the action.

IV. The court erred in not ordering and adjudging that the judgment of the supreme court of the State of New York, granting to the plaintiff the relief asked in its complaint and adjudging that the plaintiff, upon the tender of the certificates of stock de-
66 scribed in the complaint, or any of them, by the plaintiff, or its agents or assigns, to the defendant, upon request so to do, transfer said certificates of stock and each of them, on the books of the defendant to the plaintiff, or its agents or assigns, as it may

direct, and issue new certificates of stock therefor to the plaintiff, its agents or assigns, and further ordering and adjudging that the plaintiff recover of the defendant the sum of $12,135.83, together with the sum of $1391.41 costs, should be reversed, and that the plaintiff's complaint be dismissed.

V. The court erred in denying to the defendant the rights claimed by it, under the laws of the United States relating to national banks and under which the said defendant was organized and existed, and the rights claimed by it under its charter and its by-laws, made in accordance with the said laws of the United States relating to national banks, and in denying to the said defendant any relief on that ground.

VI. The court erred in not holding and adjudging that the shares of stock described in the complaint, were and are held by the plaintiff, subject to the lien of the defendant thereon, in the sum of $9886.33, as of February 14th, 1900.

VII. The court erred in denying to the defendant, the right claimed by it in its answer and in this action, to extinguish its said lien upon said stock in the sum of $9886.33, as of February 14th, 1900, from the dividends declared upon said stock by The Third National Bank of Buffalo, the defendant herein, from time to time.

VIII. The court erred in deciding against the validity of The statutes of the United States and the authority exercised under said statutes, pursuant to which this defendant claims a lien upon said certificates of stock in said defendant, which is also claimed by the plaintiff.

LEWIS & LEWIS,
Attorneys for Defendant.

67 [Endorsed:] In the court *court* of appeals, State of New York. Buffalo German Insurance Co., respondent against Third National Bank of Buffalo, appellant. Original Assignment of errors. Lewis & Lewis, appellant's attorneys, 23-25 Erie Co. Savings Bank building, Buffalo, N. Y.

68 To the Buffalo German Insurance Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to the writ of error filed in the clerk's office of the court of appeals of the State of New York, wherein The Third National Bank of Buffalo, N. Y., is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, Hon. Alton B. Parker, chief judge of the court of appeals of the State of New York, this 18th day of September in the year of our Lord, one thousand, nine hundred and two.

ALTON B. PARKER,
Chief Judge of the Court of Appeals of the State of New York.

69 STATE OF NEW YORK, } ss:
County of Erie, City of Buffalo, }

On this 26th day of September 1902, personally appeared William C. Carroll before me, the subscribed, and makes oath that he delivered a true copy of the within citation to the Buffalo German Insurance Company, by delivering the same to and leaving the same with, Oliver J. Eggert, president of said company.

WILLIAM C. CARROLL.

Subscribed and sworn to before me, this 26th day of September, 1902.

[Seal of J. Allen Keeney, Notary Public, Erie County, N. Y.]

J. ALLEN KEENEY,
Notary Public, Erie County, Com'r of Deeds in and for Buffalo, N. Y.

70 [Endorsed:] Supreme Court of the United States. Buffalo German Insurance Company against Third National Bank of Buffalo Original Citation Lewis & Lewis, appellant's attorneys, 23–25 Erie Co. Savings Bank building, Buffalo, N. Y.

71 STATE OF NEW YORK:

Court of Appeals, Clerk's Office.

I, W. H. Shankland, clerk of the court of appeals of the State of New York, do hereby certify that the annexed papers are copies of the return on appeal to the court of appeals, and of the whole thereof upon which the said court acted in rendering judgment herein, and of the judgment of said court and of the opinion thereof rendered on a former appeal herein, and that the same are true and correct copies of the originals remaining on file in this office, together with original petition, writ of error, assignment of errors and citation to the Supreme Court of the United States, and the whole thereof constituting the return to the writ of error herein.

Seal State of New York Court of Appeals.

In witness whereof, I have hereunto set my my hand and affixed the official seal of the court at the city of Albany, this twenty-ninth day of September, A. D., one thousand nine hundred and two.

W. H. SHANKLAND, *Clerk.*

Endorsed on cover: File No. 18,706. New York court of appeals. Term No. 146. The Third National Bank of Buffalo, N. Y., plaintiff in error, *vs.* The Buffalo German Insurance Company. Filed October 21st, 1902.